Supreme Court, U.S.
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No. 01 502 SEP 2 4 2001

IN THE

Supreme Court of the United States

BRIAN FISCHER, Superintendent of
Sing Sing Correctional Facility,

Petitioner,

—against—

VICTOR ZARVELA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the total exhaustion rule of *Rose v. Lundy*, 455 U.S. 509 (1982), requires the dismissal of a federal habeas corpus petition containing both exhausted and unexhausted claims, regardless of whether, as a result of that dismissal, a second petition filed after the exhaustion of state remedies may be time-barred by the statute of limitations set forth in the Antiterrorism and Effective Death Penalty Act of 1996.

PARTIES TO THE PROCEEDING

The petitioner in this Court is Brian Fischer, the Superintendent of Sing Sing Correctional Facility, which is the state prison where Victor Zarvela is incarcerated; Mr. Fischer is substituted for Christopher Artuz, who was the respondent in the lower courts and was the superintendent of the previous correctional facility at which Mr. Zarvela was incarcerated. Mr. Fischer is represented in this federal habeas corpus proceeding by Kings County District Attorney Charles J. Hynes, by agreement with the Attorney General of the State of New York. The respondent in this Court is Victor Zarvela, who was convicted of murder and weapon possession in the New York state courts and filed the federal habeas corpus petition that is the subject of this litigation.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Brian Fischer, Superintendent of Sing Sing Correctional Facility in New York, requests that this Court issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit that reversed a judgment of the United States District Court for the Eastern District of New York (Raggi, J.), and remanded the case to that court for further proceedings concerning Victor Zarvela's petition for a writ of habeas corpus. The United States District Court for the Eastern District of New York had dismissed the petition for a writ of habeas corpus on the ground that the petition was untimely pursuant to 28 U.S.C. § 2244(d).

Opinions Below

The citation of the opinion of the United States Court of Appeals for the Second Circuit is *Zarvela v. Artuz*, 254 F.3d 374 (2d Cir. 2001). The opinion of the United States District Court for the Eastern District of New York is not officially reported, but the LEXIS citation of that opinion is *Zarvela v. Artuz*, No. 97-CV-2393, 1999 U.S. Dist. LEXIS 20602 (E.D.N.Y. Dec. 3, 1999). The citation of the opinion of the Appellate Division is *People v. Zarvela*, 211 A.D.2d 690, 622 N.Y.S.2d 465 (2d Dep't 1995). The opinions of the state trial court deciding the motions to vacate the judgment are not officially reported. Each of these opinions is reproduced in the Appendix to this petition.

Jurisdiction

The judgment of the United States Court of Appeals for the Second Circuit was entered on June 14, 2001, was amended on June 26, 2001, and was again amended on August 17, 2001. This petition for certiorari was filed within ninety days after June 14, 2001, the date of entry of the judgment. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

Statutory Provision Involved

28 United States Code § 2244 provides in pertinent part:

Finality of determination

. . . .

(d)(1) A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—

(A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;

(B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;

(C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right has been newly recognized by the Supreme Court and made

retroactively applicable to cases on collateral review; or

(D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

(2) The time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim is pending shall not be counted toward any period of limitation under this subsection.

STATEMENT OF THE CASE

Introduction

Victor Zarvela ("defendant"), was convicted, after a jury trial, of intentional murder and criminal possession of a weapon for fatally shooting Tracie Hill in the face during a dispute over narcotics in Brooklyn, New York on February 26, 1990. After pursuing unsuccessful efforts in state court to overturn his conviction, defendant filed a petition for a writ of habeas corpus in federal district court on April 22, 1997, just two days before the expiration of the one-year time limit of the statute of limitations applicable to habeas petitions. Defendant's habeas petition was a "mixed" petition that contained both exhausted and unexhausted claims. On June 2, 1997, the District Court granted defendant's request to withdraw his petition so that he could exhaust in state court an additional claim, which was not included in his habeas petition, and which was based on alleged newly-discovered evidence.

After exhausting that claim in state court, defendant waited fourteen days before refiling his federal habeas petition. Consequently, on December 3, 1999, the Dis-

trict Court dismissed defendant's refiled petition on the ground that it was untimely under the statute of limitations. On June 14, 2001, the Second Circuit reversed the District Court's dismissal and held that, because of the possibility that withdrawal of the original petition would make a refiled petition untimely, the District Court should have disregarded defendant's request to withdraw his petition and, instead, should have held the exhausted claims in abeyance pending exhaustion of the unexhausted claims. The Second Circuit held further that the District Court should have given defendant thirty days to initiate exhaustion in state court and an additional thirty days to return to federal court after exhaustion.

The Trial

At the trial, the State introduced evidence that Tracie Hill and Juan Gonzolez sold crack-cocaine for defendant. Gonzolez testified that on the evening of February 26, 1990, defendant argued with Tracie Hill on the street about the sale of crack-cocaine and shot Hill in the face with a handgun, causing Hill's death. Another prosecution witness, Alba Cabrera, testified that she had bought crack-cocaine from Hill minutes before the shooting and walked away, that she returned when she heard the shot, and that she saw defendant standing over Hill and heard him warn, "Nobody better say anything."

On defendant's case, the defense sought to establish that defendant was not present at the shooting. Defendant testified that he was at a restaurant one and one-half blocks away, with his girlfriend, Doris Lugo, when the shooting occurred, and that he did not engage in narcotics trafficking. Lugo testified, however, that she was in her apartment with defendant when the shooting occurred and that defendant was involved in narcotics trafficking. Another defense witness, Janet Rosa, testified that she looked out her window after hearing shots

and saw a Caucasian man running from the scene. Lysbeth Moran testified that, on the evening of the shooting, Gonzolez ran into her mother's apartment and announced that Hill had been shot.

On December 17, 1991, defendant was convicted of intentional murder and criminal possession of a weapon. On January 21, 1992, defendant was sentenced to concurrent prison terms of twenty-five years to life for the murder and five to fifteen years for the weapon possession.

Post-Conviction Proceedings in State Court

By papers dated November 9, 1993, defendant moved in the state trial court to vacate the judgment of conviction pursuant to New York Criminal Procedure Law § 440.10, asserting three claims: (1) newly-discovered evidence, based upon affidavits from Joseph Bivona and Michael Cornell Patton, both of whom alleged that a Caucasian male was the shooter; (2) a violation of defendant's right to be present at sidebar conferences with prospective jurors; and (3) ineffective assistance of counsel because of counsel's failure to seek dismissal of the indictment based upon the alleged presence of an unauthorized person in the grand jury. On March 15, 1995, the trial court issued an order denying the motion, Appendix ("App.") at 27a-36a; and on June 20, 1995, defendant's application for leave to appeal from that order was denied.

Defendant also filed a direct appeal from his judgment of conviction to the New York Supreme Court, Appellate Division, Second Judicial Department. On appeal, defendant raised three claims: (1) the trial court erroneously precluded Moran's testimony about Gonzolez's alleged statement in the apartment that a Caucasian man was the shooter; (2) the trial court erroneously admitted evidence

of defendant's involvement in narcotics trafficking; and (3) the trial court's charge on reasonable doubt lessened the State's burden of proof. On January 17, 1995, the Appellate Division affirmed the judgment of conviction. *People v. Zarvela*, 211 A.D.2d 690, 622 N.Y.S.2d 465 (2d Dep't 1995), App. at 24a-26a. On June 2, 1995, defendant's application for leave to appeal to the New York Court of Appeals was denied. *People v. Zarvela*, 86 N.Y.2d 743, 655 N.E.2d 721, 631 N.Y.S.2d 624 (1995) (Ciparick, J.).

The First Federal Habeas Corpus Petition

By papers dated April 22, 1997, defendant, acting *pro se*, sought a writ of habeas corpus in the United States District Court for the Eastern District of New York. Defendant raised four fully-exhausted claims: the three claims from his direct appeal and the claim from his post-trial motion regarding his right to be present at sidebar. He also raised a partially-exhausted claim of newly-discovered evidence, which was based in part upon the affidavits of Bivona and Patton submitted in support of his post-trial motion and in part upon an affidavit of Olga Soto, which had not been presented to the state courts. In that affidavit, Soto alleged that, just after the shooting, an acquaintance told her that a Caucasian man had shot Hill. In his habeas petition, defendant also raised two unexhausted claims: failure to disclose exculpatory evidence, namely an audiotape of Soto's alleged telephone call to 911; and ineffective assistance of trial counsel for failure to investigate.

By a letter to the District Court dated May 26, 1997, defendant requested permission to withdraw his habeas petition so that he could raise and exhaust new claims based upon information allegedly obtained pursuant to the New York Freedom of Information Law (N.Y. Pub. Off. Law §§ 84-90) and upon affidavits from pur-

ported witnesses who allegedly knew the identity of the shooter. On June 2, 1997, the District Court granted defendant's request to withdraw the petition.

Additional Proceedings in State Court

By papers dated June 11, 1997, defendant filed in the state trial court a second motion to vacate the judgment, in which he again raised a claim of newly-discovered evidence. Defendant supported his claim with the affidavits of Bivona and Patton from his previous motion, added the Soto affidavit, and added an affidavit of Gregorio Brito. Brito alleged that he had witnessed the shooting of Hill and that the shooter was not defendant. Brito asserted that he had not come forward earlier because he was evading apprehension for another homicide and that he came forward only when he met defendant in prison.

On July 31, 1998, the trial court issued an order denying defendant's motion, App. at 37a-41a; and on September 23, 1998, defendant's application for leave to appeal from that order was denied.

The Second Federal Habeas Corpus Petition

By papers dated October 7, 1998, defendant again sought a writ of habeas corpus in the District Court. In his habeas petition, defendant again raised the three claims that he had raised on direct appeal, and also raised two claims of newly-discovered evidence, one based upon the affidavits of Bivona, Patton, and Soto, and the other based upon the affidavit of Brito. On September 8, 1999, the District Court ordered defendant to show cause why his petition should not be dismissed as untimely. The court noted that defendant apparently had only two days remaining under the statute of limitations in which to refile his petition and that he waited

fourteen days after the tolling period for state collateral attacks had ended before he refiled his petition. Defendant did not argue that his petition was timely. Rather, defendant argued that the statute of limitations should be equitably tolled because of his "lock down" status in prison, which allegedly restricted his access to the law library and to legal assistance, and because of his lack of proficiency in English.

By a memorandum and order dated December 3, 1999, the District Court dismissed defendant's petition as untimely. App. at 18a-23a (Raggi, J.). Making allowance for notification by mail of the Appellate Division's denial of leave to appeal, the District Court found that defendant's refiled petition was nine days late. App. at 20a-23a. The District Court also rejected defendant's equitable tolling argument. App. at 21a-23a.

The Decision of the Court of Appeals

The United States Court of Appeals for the Second Circuit reversed the judgment of the District Court and remanded for further proceedings. 254 F.3d 374, App. at 1a-17a. The Second Circuit concluded that the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), with its statute of limitations for habeas corpus petitions filed by state prisoners, "warrants some adjustment" in the requirement of *Rose v. Lundy*, 455 U.S. 509 (1982), that mixed petitions be dismissed in their entirety. 254 F.3d at 380, App. at 10a. Accordingly, the Second Circuit ruled that the District Court should not have granted defendant's request to withdraw his petition, but instead should have stayed the exhausted claims in the petition and allowed defendant a reasonable time to return to state court to initiate exhaustion of the unexhausted claims and an additional reasonable time to return to federal court after exhaustion. The Second Circuit ruled that thirty days "nor-

mally" would be a reasonable time for each period. 254 F.3d at 381, App. at 12a. The Second Circuit treated defendant's petition as if it had been stayed, noted that defendant had gone from federal court to state court promptly and, after exhaustion, had returned to federal court promptly, and consequently found that defendant's refiled petition was timely. 254 F.3d at 382-83, App. at 15a-17a.

The Second Circuit noted that, after the enactment of AEDPA, other federal courts of appeals have disagreed as to the appropriate disposition of habeas petitions containing both exhausted and unexhausted claims. 254 F.3d at 380, App. at 9a-10a. In addition, the Second Circuit acknowledged that the District Court's decision was "entirely understandable," inasmuch as the District Court "could not have anticipated our decision calling for a properly conditioned stay in circumstances like those confronting Zarvela." 254 F.3d at 383, App. at 16a.

This petition for certiorari challenges the decision of the Court of Appeals.

REASONS FOR GRANTING THE WRIT

I. The Second Circuit's Decision Is Contrary to Decisions of this Court, and Contributes to a Conflict Among the Federal Courts of Appeals, Concerning the Proper Disposition of a "Mixed" Habeas Corpus Petition. Furthermore, the Second Circuit's Decision Conflicts with the One-Year Time Limit Prescribed by the Statute of Limitations Applicable to Habeas Petitions.

In the decision below, the Second Circuit held that the District Court was required to stay defendant's "mixed" habeas corpus petition—one containing both exhausted and unexhausted claims—and that the District Court was required effectively to grant defendant additional time, beyond the one-year period of limitation prescribed by statute, in which to exhaust his unexhausted claims in state court. The Second Circuit's decision is inconsistent with the decision of this Court in *Rose v. Lundy*, 455 U.S. 509 (1982), which held that mixed petitions must be dismissed. In addition, as the Second Circuit noted, its decision adds to an existing conflict among the federal courts of appeals regarding the proper disposition of a mixed petition. 254 F.3d at 380, App. at 9a-10a. Moreover, the Second Circuit's decision plainly conflicts with the terms of the applicable statute of limitations. Each of these conflicts warrants the grant of certiorari to review the judgment in this case.

The Second Circuit erred in two ways. First, its requirement that the mixed petition be stayed violates the "total exhaustion" rule of *Rose v. Lundy*, 455 U.S. 509 (1982), in which this Court held unambiguously that mixed petitions "must" be dismissed. *Id.* at 510, 522. Second, the requirement of the court below that defendant be granted additional time to return to state court to initiate exhaustion, and to return to federal court after

exhaustion, has no basis in the one-year statute of limitations that governs habeas petitions. *See* 28 U.S.C. § 2244(d)(2).

In *Rose v. Lundy*, 455 U.S. 509 (1982), this Court articulated a total exhaustion rule, requiring dismissal of mixed petitions. In the case at bar, the Second Circuit asserted that the purpose of the total exhaustion rule is to assure that a district court "will not grant relief on unexhausted claims." 254 F.3d at 380, App. at 10a. The Second Circuit also noted that, in *Rose v. Lundy*, this Court "never discussed whether dismissing a petition's unexhausted claims and staying its exhausted claims could provide an acceptable alternative to dismissing the petition in its entirety."[1] 254 F.3d at 379, App. at 8a.

The analysis of *Rose v. Lundy* by the Second Circuit does not support that court's conclusion that a district court may permissibly stay a mixed petition. In *Rose v. Lundy*, this Court explicitly stated that, under the total exhaustion rule, "a district court *must* dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or of amending or resubmitting the habeas petition to present only exhausted claims to the district court." 455 U.S. at 510 (emphasis added); *see id.* at 522. Thus, the language in *Rose v. Lundy*, which unequivocally requires dismissal of mixed petitions, makes clear that staying the petition

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[1] In the recent case of *Duncan v. Walker*, 121 S. Ct. 2120 (2001), four Justices of this Court stated that staying the exhausted claims in a mixed petition is a permissible option, but that position did not command a majority of the Court. *Id.* at 2129 (Souter, J., concurring); *id.* at 2130 (Stevens, J., with whom Souter, J., joins, concurring in part and concurring in the judgment); *id.* at 2135 (Breyer, J., with whom Ginsburg, J., joins, dissenting). Moreover, unlike the Second Circuit's decision in the case at bar, none of this Court's opinions in *Duncan v. Walker* states that a district court can be *required* to stay a mixed petition.

is not an available alternative. Moreover, the purpose of the total exhaustion rule is not simply to prevent district courts from granting relief on unexhausted claims. That rule also requires a habeas petition to be ready for adjudication on all claims at one time and, thus, reduces piecemeal litigation. *See id.* at 520. In any event, even if staying a mixed petition were allowed under the total exhaustion rule, the Second Circuit should not have reversed the District Court for dismissing the petition, especially when defendant himself requested permission to withdraw his petition. Consequently, the holding of the Second Circuit that defendant's petition had to be stayed pending exhaustion is inconsistent with the decision of this Court in *Rose v. Lundy*. This conflict with *Rose v. Lundy* warrants the grant of certiorari to review the decision below.

In addition, the federal courts of appeals are divided on the question of whether, in light of AEDPA, a district court may properly stay a mixed petition rather than dismiss it, and when, if ever, a district court *must* stay such a petition rather than dismiss it. The Second Circuit's decision in this case has contributed to that conflict among the courts of appeals.

Different federal courts of appeals have reached three different conclusions regarding the proper disposition of a mixed petition. One view, which the Fifth and Tenth Circuits have adopted, is that a stay of the petition is not an acceptable alternative to dismissal. In *Graham v. Johnson*, 168 F.3d 762 (5th Cir. 1999), *cert. denied*, 529 U.S. 1097 (2000), the defendant filed a pre-AEDPA habeas petition that was dismissed for lack of exhaustion, subsequently filed a post-AEDPA petition, and argued that the post-AEDPA petition should be treated as if the earlier petition had been stayed, so that he would receive the benefit of the more favorable pre-AEDPA

standard of review. In rejecting that argument, the Fifth Circuit noted that *Rose v. Lundy* requires dismissal of habeas petitions containing any unexhausted claims, and the Fifth Circuit stated that it found no support for the proposition that "abatement of an application containing unexhausted claims is generally an acceptable substitute for dismissal." 168 F.3d at 777-78. Similarly, in *Petrick v. Martin*, 236 F.3d 624 (10th Cir. 2001), *overruled on other grounds by Duncan v. Walker*, 121 S. Ct. 2120 (2001), the Tenth Circuit, also citing *Rose v. Lundy*, noted that unless the State has waived the exhaustion requirement or the defendant's claims are clearly meritless, "dismissal of a petition containing unexhausted claims is mandatory." 236 F.3d at 628. Thus, the Tenth Circuit implicitly rejected the alternative of staying such a petition.

A different conclusion, adopted by the Ninth Circuit, is that a district court can, in effect, stay a mixed petition by allowing the defendant to amend the petition to delete the unexhausted claims, by holding the amended petition in abeyance while the defendant exhausts the deleted claims in state court, and by allowing the defendant, after exhaustion, to amend the petition to add the newly-exhausted claims. *See Hasan v. Galaza*, 254 F.3d 1150, 1152 n.2 (9th Cir. 2001); *Calderon v. United States District Court (Taylor)*, 134 F.3d 981, 986-88 (9th Cir. 1998). However, while the Ninth Circuit has approved that procedure, it has not suggested that a district court would ever be required to follow the procedure rather than dismiss the petition.

Yet a third view, adopted by the Second Circuit in this case as well as by the First and Seventh Circuits, is that a district court may properly stay a mixed petition, and that, indeed, in some cases, the district court may be required to do so. In *Freeman v. Page*, 208 F.3d 572 (7th

Cir.), *cert. denied*, 531 U.S. 946 (2000), the Seventh Circuit held that the defendant's habeas petition was untimely because a state collateral attack was not "properly filed" within the meaning of 28 U.S.C. § 2244(d)(2). However, the Seventh Circuit stated that the defendant could have avoided dismissal under the statute of limitations by filing, within the limitation period, his habeas petition containing the unexhausted claim; the Seventh Circuit stated that "[t]he federal judge likely would have stayed proceedings until resolution of Freeman's appeal in state court," and that "[h]ad the district court dismissed the federal petition, we would have reversed." 208 F.3d at 577. Thus, the Seventh Circuit took the position that a stay of the petition would have been not only permissible, but required. Similarly, in the case at bar, the Second Circuit held that the District Court was not only authorized, but required, to stay the petition pending exhaustion. Finally, in *Neverson v. Bissonnette*, No. 00-1044, 2001 U.S. App. LEXIS 18724 (1st Cir. Aug. 20, 2001), the First Circuit, relying in part on the decision of the Second Circuit in this case, stated that, in light of AEDPA, a stay of a petition pending exhaustion "will be the preferable course in many cases involving 'mixed' petitions—and it may be the only appropriate course in cases in which an outright dismissal threatens to imperil the timeliness of a collateral attack." *Id.* at *13 n.3; *see also Delaney v. Matesanz*, No. 99-1972, 2001 U.S. App. LEXIS 19664, at *19 n.5 (1st Cir. Sept. 5, 2001) (recommending stay pending exhaustion when original habeas petition is timely filed but there is danger that second petition, filed after exhaustion, will be untimely).

Thus, the decision of the Second Circuit in this case conflicts with decisions of the Fifth and Tenth Circuits on the issue of whether a district court may properly stay a mixed habeas petition, conflicts with decisions of the

Ninth Circuit regarding the procedure that may be employed to effect such a stay, and conflicts with decisions of all three of those courts on the issue of whether a district court is ever required to grant such a stay. Certiorari should be granted to resolve these conflicts among the federal courts of appeals.

Furthermore, the Second Circuit's decision impermissibly rewrites the statute of limitations by effectively granting defendant more time, beyond the time permitted by the statute, in which to pursue exhaustion of his claims in state court in preparation for litigation of those claims in a federal habeas petition. The Second Circuit ruled that the District Court should have stayed the petition, and should have allowed defendant thirty days to initiate exhaustion in state court and another thirty days to refile his petition in federal court after exhaustion. But the tolling provision of the one-year statute of limitations applies only to "[t]he time during which a properly filed application for State post-conviction or other collateral review with respect to the pertinent judgment or claim *is pending*." 28 U.S.C. § 2244(d)(2) (emphasis added). Thus, the language of the statute is clear: the tolling provision applies only to the time from the filing of the application in state court to the completion of the state court's adjudication of that application. The tolling provision omits reference to any periods during which a petitioner prepares to file an application for state collateral relief or prepares to file a federal habeas petition after exhaustion.

Consequently, courts must presume that Congress's omission from the tolling provision of any reference to these preparation periods was intentional, and that Congress intended to limit the tolling provision for state applications only to the time during which the application was actually pending before the state court. Therefore, because the language of the tolling provision

permits exclusion from the period of limitation only of the time during which an application for collateral relief is pending in state court, the Second Circuit erred by effectively tolling the statute of limitations for an additional thirty days to allow defendant to prepare his state application and for another thirty days to allow him to return to federal court after exhaustion. *See Artuz v. Bennett*, 531 U.S. 4, 10 (2000) (in construing AEDPA, Court may not rewrite statute to accommodate policy arguments); *United States v. Johnson*, 529 U.S. 53, 58 (2000) ("When Congress provides exceptions in a statute, it does not follow that courts have authority to create others. The proper inference, and the one we adopt here, is that Congress considered the issue of exceptions and, in the end, limited the statute to the ones set forth").

Moreover, the Second Circuit is incorrect in concluding that AEDPA warrants "adjustment" in the total exhaustion rule of *Rose v. Lundy* so as to allow district courts to stay mixed petitions pending the exhaustion of state remedies. Congress presumably was well aware of the total exhaustion rule when it enacted AEDPA in 1996, because the rule had been clearly established. *See Coleman v. Thompson*, 501 U.S. 722, 731 (1991); *Castille v. Peoples*, 489 U.S. 346, 349 (1989); *Engle v. Isaac*, 456 U.S. 107, 124 n.25 (1982) (all stating that mixed petitions must be dismissed); *see also Strickland v. Washington*, 466 U.S. 668, 684 (1984) (total exhaustion rule is to be "strictly enforced"). The only way in which Congress modified the total exhaustion rule was to authorize denial of a habeas petition on the merits even if the petition contained unexhausted claims. *See* 28 U.S.C. § 2254(b)(2); *Lindh v. Murphy*, 521 U.S. 320, 333 n.7 (1997) (AEDPA provision newly authorized federal courts to reject unexhausted claim on merits). However, Congress otherwise left the total exhaustion rule

intact, and thus apparently did not intend to modify that rule so as to allow district courts to stay mixed petitions pending exhaustion. Consequently, the Second Circuit erred by concluding that AEDPA alters the requirement of *Rose v. Lundy* that mixed petitions be dismissed in their entirety.

Indeed, the Second Circuit acknowledged that the District Court's dismissal of the petition was "entirely understandable," because the District Court "could not have anticipated" the Second Circuit's decision requiring a stay in this case. 254 F.3d at 383, App. at 16a. The Second Circuit itself therefore appears to recognize that its decision is not supported by the total exhaustion rule of *Rose v. Lundy* or by the provisions of the statute of limitations.

Thus, the Second Circuit's decision conflicts with decisions of this Court that require dismissal of habeas corpus petitions containing both exhausted and unexhausted claims; conflicts with decisions of other federal courts of appeals as to whether a district court may stay such a petition and when, if ever, a district court must do so; and also conflicts with the provisions of the statute of limitations that governs habeas petitions. This Court should grant the writ of certiorari to review the judgment below and to resolve each of these conflicts.

II. The Second Circuit's Decision Presents a Significant and Recurring Question Concerning the Construction of the Statute of Limitations Applicable to Habeas Corpus Petitions and Concerning the Proper Disposition of a "Mixed" Habeas Petition.

The District Court granted defendant's request to withdraw his habeas corpus petition so that he could exhaust a claim in state court, and after defendant

exhausted the claim and refiled his habeas petition, the District Court dismissed the refiled petition on the ground that it was untimely under the statute of limitations. The Second Circuit reversed and held that the District Court instead should have stayed the original petition and allowed defendant additional time to pursue exhaustion in state court, and that consequently the refiled petition was not untimely. This case presents an important issue that concerns the meaning and application of the statute of limitations that governs habeas corpus petitions, *see* 28 U.S.C. § 2244(d), as well as the interplay between the provisions of that statute and the total exhaustion rule of *Rose v. Lundy*, 455 U.S. 509 (1982). Certiorari should be granted because the Second Circuit's resolution of that issue allows defendants additional time in which to file habeas petitions beyond the time permitted by the statute of limitations, creates uncertainty and inconsistency in the application of that statute, and will unnecessarily burden the dockets of the federal district courts.

First, the Second Circuit's holding will effectively allow habeas petitioners additional time, beyond the one year permitted by the statute of limitations, in which to file their petitions, and will allow them to be less diligent in promptly exhausting their claims in state court. Under the Second Circuit's approach, when almost no time remains in the limitation period, a defendant can file a petition containing a single exhausted claim and numerous unexhausted claims, and then, after the limitation period would have expired, can initiate exhaustion in state court and return to federal court. The one-year period of limitation imposed by the statute serves "the well-recognized interest in the finality of state court judgments." *Duncan v. Walker*, 121 S. Ct. 2120, 2128 (2001). In addition, the provisions of AEDPA, as well as the total exhaustion rule, "encourage litigants *first* to

exhaust all state remedies and *then* to file their federal habeas petitions as soon as possible." *Id.* at 2129 (emphasis in original); *see Rose v. Lundy*, 455 U.S. at 520 (total exhaustion rule reduces piecemeal litigation by encouraging habeas petitioners "to exhaust all of their claims in state court and to present the federal court with a single habeas petition"). The Second Circuit's decision thwarts both of these purposes by effectively allowing defendants additional time in which to pursue exhaustion in state court and in which to present the newly-exhausted claims in a federal habeas petition.

Second, the decision of the court below creates uncertainty and inconsistency in the application of the statute of limitations. The Second Circuit stated that a district court is required to grant a stay when dismissal of a mixed petition "jeopardize[s] the timeliness of a collateral attack." 254 F.3d at 382, App. at 15a (citation omitted). However, the Second Circuit did not define that standard, and thus leaves district courts with little guidance in determining when they are barred from dismissing a mixed petition. In addition, the Second Circuit stated that the periods that a district court should grant for a defendant to return to state court to initiate exhaustion, and to return to federal court after exhaustion, each should "normally" be thirty days. 254 F.3d at 381, App. at 12a. However, the Second Circuit did not explain how it arrived at that number of days or what factors might be relevant to determining whether a different period is appropriate in a particular case. Nor does the Second Circuit's decision prevent a district court from allowing periods longer than thirty days in every case. Thus, the Second Circuit's decision undermines the clarity of the one-year statutory time limit, and creates the potential for disparate results before different district courts.

Third, the Second Circuit's holding will unnecessarily burden the dockets of the district courts. Under the total exhaustion rule, a district court must dismiss a mixed petition, the case is removed from the court's docket, and the district court thereafter will have occasion to review the case again only if, and when, the defendant files a new habeas petition, presumably following exhaustion in state court. By contrast, under the Second Circuit's approach, when a district court stays a petition, and the defendant initiates exhaustion within the time allowed by the district court, the petition would remain pending before the district court until the process of exhausting claims in state court is concluded. But that process—which often involves evidentiary hearings and further appeals—may last for months, or even years. Thus, the Second Circuit's decision will potentially have the effect of requiring district courts to retain on their dockets numerous prematurely-filed habeas petitions while awaiting the outcome of lengthy state court proceedings that should have been resolved before the defendant ever came to federal court.

The Second Circuit's decision apparently rests on that court's observation that if a prisoner files a mixed petition late in the one-year period of limitation, then a dismissal of the petition jeopardizes all of his claims "because the one-year limitations period will likely expire during the time taken to initiate state court exhaustion and to return to federal court after exhaustion is completed." 254 F.3d at 379, App. at 9a. However, that observation does not justify departure from the total exhaustion rule of *Rose v. Lundy* or from the plain language of the statute of limitations.

The statute itself contains a number of provisions that adequately assure sufficient time for a prisoner to exhaust his claims in state court and then to assert those claims in a federal habeas petition. First, the period of

limitation does not even begin to run until, at the earliest, the conclusion of direct state review or the expiration of the time for seeking such review. 28 U.S.C. § 2244(d)(1)(A). Thus, any federal claims raised on direct appeal will already be exhausted when the limitation period begins to run, and, prior to that time, the prisoner will already have had time to pursue any appropriate state collateral review. Second, after the limitation period begins to run, the prisoner has one year in which to file a federal habeas petition. 28 U.S.C. § 2244(d)(1). Third, the statute tolls the limitation period during the pendency of a properly-filed application for state collateral review, 28 U.S.C. § 2244(d)(2), thus protecting the prisoner's ability to seek federal habeas relief after state remedies are exhausted. *See Duncan v. Walker*, 121 S. Ct. at 2128. Fourth, if the claim is based on a retroactive change in the law by this Court or is based on facts that could not have been discovered by due diligence, then the statute delays the commencement of the one-year limitation period until the date of the change in the law or until the date on which the relevant facts could have been discovered by due diligence. 28 U.S.C. § 2244(d)(1)(C), (D). In light of these provisions, a prisoner should, with reasonable diligence, be able to exhaust his claims and to file a federal habeas petition well within the limitation period.

In this case, defendant inexcusably failed to file his first federal habeas petition until April 22, 1997, just two days before the expiration of the one-year period of limitation, and he offered no explanation why his claims of newly-discovered evidence, insofar as those claims rested on the affidavits of Olga Soto and Gregorio Brito, were not previously exhausted in state court.[2] Conse-

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[2] At the time defendant filed his first habeas petition on April 22, 1997, the affidavits of Soto and Brito had not yet been presented to any state court. The affidavit of Soto was dated July 3, 1996, and

quently, the dismissal of defendant's second habeas petition as untimely was the result of his own lack of diligence, and was not attributable to any alleged inequities in the total exhaustion rule or the statute of limitations.

This case presents an important and recurring issue regarding the exhaustion requirement and the construction of the statute of limitations applicable to habeas corpus petitions. That issue has given rise to a conflict between the decision below and this Court's decision in *Rose v. Lundy*, as well as a conflict among the federal courts of appeals. Certiorari should be granted to review the judgment below, to resolve these conflicts, and to ensure the proper application of the exhaustion requirement and enforcement of the one-year statutory time limit on the filing of habeas petitions.

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thus was apparently available to defendant more than nine months before he filed the habeas petition; the affidavit of Brito was dated February 18, 1997, and thus was apparently available to defendant two months before he filed the petition.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

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September 12, 2001

APPENDIX

AMENDED OPINION

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 2000

Argued: May 1, 2001 Decided: June 14, 2001
Amended: June 26, 2001
Amended: August 17, 2001

Docket No. 99-2757

VICTOR ZARVELA,

Petitioner-Appellant,

—v.—

CHRISTOPHER ARTUZ, Superintendent,

Respondent-Appellee.

Before:

NEWMAN and CABRANES, *Circuit Judges*,
and THOMPSON,* *District Judge*.

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* Honorable Alvin W. Thompson, United States District Court for the District of Connecticut, sitting by designation.

Appeal from the December 14, 1999, judgment of the United States District Court for the Eastern District of New York (Reena Raggi, District Judge), dismissing a petition for a writ of habeas corpus as untimely.

Reversed and remanded.

RANDALL U. UNGER, Kew Gardens, N.Y. submitted a brief *for petitioner-appellant.*

THOMAS M. ROSS, Asst. Dist. Atty., Brooklyn, N.Y. (Charles J. Hynes, Dist. Atty., Leonard Joblove, Asst. Dist. Atty., Brooklyn, N.Y., on the brief), *for respondent-appellee.*

JON O. NEWMAN, *Circuit Judge.*

The basic issue on this appeal concerns the timeliness of a habeas corpus petition. The more precise issues are (1) whether a district court confronted with a so-called "mixed petition" containing exhausted and unexhausted claims should dismiss the petition without prejudice to renewal after exhaustion, or stay further proceedings, and (2) if a stay is entered, whether the stay should be conditioned on prompt initiation of state court exhaustion and prompt return to federal court at the completion of exhaustion. These issues arise on an appeal by Victor Zarvela from the December 14, 1999, judgment of the District Court for the Eastern District of New York

(Reena Raggi, District Judge), dismissing as untimely his habeas corpus petition to challenge his state court conviction. We conclude (1) that a district judge confronting a mixed petition has discretion either to dismiss the petition, or to dismiss only the unexhausted claims and stay the balance of the petition, (2) that in this case a stay should have been entered in response to Zarvela's request to have his mixed petition withdrawn in order to avoid untimeliness, and (3) that the stay should have been conditioned on Zarvela's prompt initiation of state court exhaustion and his prompt return to federal court after completion of exhaustion. Because, with such a stay, Zarvela's petition would have remained timely, we reverse and remand.

Background

Zarvela was convicted of weapons possession and second-degree murder in New York Supreme Court in 1992. The evidence permitted the jury to find that Zarvela sold drugs wholesale and that he shot one of his retailers. Zarvela was sentenced to 25 years to life. His conviction was affirmed by the Appellate Division in 1995, *People v. Zarvela*, 611 N.Y.S.2d 465 (N.Y. App. Div. 1995), and review by the New York Court of Appeals was denied, *People v. Zarvela*, 86 N.Y.2d 743 (1995). Zarvela then filed in the state trial court a motion to vacate the judgment, which was denied in 1995; the Appellate Division declined to hear the appeal of the denial.

On April 22, 1997, Zarvela delivered to prison officials a petition for a writ of habeas corpus. *See Houston v. Lack*, 487 U.S. 266, 276 (1988) (timeliness of prisoner's filing measured from date papers handed to prison authorities for mailing). The petition presented five

exhausted claims and two unexhausted claims. The petition was delivered two days before the one-year anniversary of the effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA") and was therefore within AEDPA's one-year limitations period, 28 U.S.C. § 2244(d), as applied to habeas petitions challenging convictions that became final prior to AEDPA. *See Ross v. Artuz*, 150 F.3d 97, 103 (2d Cir. 1998). On May 26, 1997, Zarvela wrote the District Judge a letter, seeking permission to withdraw his petition, without prejudice to renewal at a later date, so that he could present a new claim to the state courts. Zarvela explained that he had recently obtained through a freedom of information request exculpatory evidence that he believed would support a constitutional challenge to his conviction under *Brady v. Maryland*, 373 U.S. 83, 87 (1963). On June 2, 1997, Judge Raggi endorsed the following ruling on the letter: "Motion to withdraw granted. Clerk to mark case closed. So ordered. Notice: All parties." However, her ruling was not entered on the docket until August 21, 1997.

On June 11, 1997, only nine days after Judge Raggi made her endorsement ruling and more than two months before her ruling was docketed, Zarvela delivered to prison officials a second motion to vacate his conviction, raising the new claim that he had mentioned in his letter to Judge Raggi. More than a year later, in July 1998, the state trial court denied Zarvela's motion on the ground that the evidence claimed to be exculpatory was available to Zarvela before trial. The Appellate Division denied leave to appeal on September 23, 1998.

On October 7, 1998, fourteen days after the Appellate Division's denial, Zarvela delivered a second federal habeas petition to prison officials. This petition included

only the exhausted claims from the first petition (the two unexhausted claims from that petition were dropped), plus the new claim that had just been rejected by the state courts. This petition prompted Judge Raggi to re-open Zarvela's closed case.

Judge Raggi dismissed the petition as untimely. She concluded that Zarvela's petition was nine days late, according to the following calculation. First, Judge Raggi found that Zarvela had only two days of eligibility left when he initially filed his federal habeas petition on April 22, 1997. She deemed the one-year clock to have stopped upon that initial filing. Then she deemed the clock to have restarted on September 26, 1998, three days after the state court denial of Zarvela's second collateral attack became final. In effect, Judge Raggi tolled several intervals: the time the initially filed federal petition had been pending, the time between her endorsement ruling and Zarvela's second state court motion, the time that motion was pending in the state courts, and three more days for Zarvela to get notice by mail of the Appellate Division's September 23, 1998, rejection, *see* Fed. R. Civ. P. 6(e).[1] The clock then ran for eleven days until Zarvela refiled his federal petition on October 7, 1998. Because Zarvela had only two days left on the one-year limitations period when he initially filed his habeas petition, Judge Raggi concluded that his refiled petition was nine days late. She also rejected his claims for equitable tolling based on circumstances in the prison where he was confined.

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[1] Rule 6(e) provides: "Whenever a party has the right or is required to do some act or take some proceedings within a prescribed period after the service of a notice or other paper upon the party and the notice or paper is served upon the party by mail, 3 days shall be added to the prescribed period."

This Court granted a certificate of appealability, appointed counsel, and ordered briefing on the issues of (1) whether the refiled petition was timely, (2) whether the initially filed petition remained pending due to the lack of a judgment entered upon Judge Raggi's endorsement ruling, and (3) whether Judge Raggi should have stayed the initially filed petition, rather than dismissing it.

Discussion

This case illustrates the procedural complexities confronting a prisoner who endeavors to exercise his statutory right to challenge a state court conviction by means of a petition to a federal district court for a writ of habeas corpus. First, he is required to exhaust in the state courts any constitutional claim he seeks to present in federal court. *See Daye v. Attorney General*, 696 F.2d 186, 190-92 (2d Cir. 1982) (in banc). If he fails to realize that one or more of his claims has not been fully exhausted (a matter that is not necessarily obvious), he will be considered to have filed a so-called "mixed petition," in which event the district court must either send him back to state court or afford him the opportunity to abandon his unexhausted claims and proceed only with his exhausted claims. *Rose v. Lundy*, 455 U.S. 509, 519-20 (1982). If, after filing a habeas petition with fully exhausted claims, he wishes to present a new claim, he must endeavor to amend a still pending petition, *cf. Warren v. Garvin*, 219 F.3d 111, 114 (2d Cir. 2000) (new claim does not relate back to dismissed petition), because filing the new claim in a second petition will encounter the severe limitations that AEDPA imposes on the filing of second or successive

petitions.[2] 28 U.S.C. § 2244(b)(2). If his petition contains unexhausted claims that he wishes to pursue, he must return to state court and exhaust these claims. Finally, he must make sure that he has complied with the one-year statute of limitations that AEDPA establishes for filing habeas petitions. 28 U.S.C. § 2244(d).

AEDPA contains a tolling provision that partially ameliorates these procedural complexities. The time during which a properly filed application for state court post-conviction relief is pending in state courts is exempted from the one-year limitations period. 28 U.S.C. § 2244(d)(2). In addition, we have ruled that, under appropriate circumstances, the one-year period is subject to equitable tolling. *Smith v. McGinnis*, 208 F.3d 13, 17 (2d Cir. 2000). However, the time that a habeas petition is pending in federal court is not exempted from the one-year limitations period. *Duncan v. Walker*, No. 00-121, 2001 WL 672270 (U.S. Jun. 18, 2001).

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[2] Section 2244(b)(2) provides:

> A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless—
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> (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
>
> (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

The appropriate disposition of a mixed petition was first considered by the Supreme Court in *Rose v. Lundy*, *supra*. The Court ruled that "a district court must dismiss such 'mixed petitions,' leaving the prisoner with the choice of returning to state court to exhaust his claims or amending or resubmitting the habeas petition to present only exhausted claims to the district court." *Lundy*, 455 U.S. at 510. That direction was given before Congress significantly altered habeas corpus procedure by imposing a one-year statute of limitations and sharply limiting the grounds for second or successive petitions. After AEDPA, the procedure for accomplishing complete exhaustion merits reconsideration for several reasons.

First, *Lundy* had no occasion to consider alternative procedures for accomplishing total exhaustion. The issue there was only whether the habeas court should proceed to adjudicate a mixed petition. Some courts had said yes, and some had said no. *See id.* at 513 n.5. The Supreme Court ruled that a habeas court cannot proceed to adjudicate a mixed petition. The Court never discussed whether dismissing a petition's unexhausted claims and staying its exhausted claims could provide an acceptable alternative to dismissing the petition in its entirety.

Second, the enactment of AEDPA has altered the context in which the choice of mechanics for handling mixed petitions is to be made. Before AEDPA, there was no statute of limitations. In that context, Justice O'Connor could write, "[O]ur interpretation of §§ 2254(b), (c) provides a simple and clear instruction to potential litigants: before you bring any claims to federal court, be sure that you first have taken each one to state court." *Id.* at 520. With unlimited time, a prisoner could leisurely consider all possible federal claims and develop state court writs to exhaust them. After AEDPA, the pris-

oner has just one year. If he mistakenly comes to federal court too soon, *i.e.*, with one or more unexhausted claims, and does so late in the allotted one year, a dismissal of his mixed petition risks the loss of all of his claims because the one-year limitations period will likely expire during the time taken to initiate state court exhaustion and to return to federal court after exhaustion is completed.

Third, what *Lundy* is primarily about is well captured in the following statement:

> Because "it would be unseemly in our dual system of government for a federal district court to upset a state court conviction without an opportunity to the state courts to correct a constitutional violation," federal courts apply the doctrine of comity, which "teaches that one court should *defer* action on causes properly within its jurisdiction *until* the courts of another sovereignty with concurrent powers, and already cognizant of the litigation, have had an opportunity to pass upon the matter."

Id. at 518 (quoting *Darr v. Burford*, 339 U.S. 200, 204 (1950) (emphases added)). Staying the exhausted claims would be a traditional way to "defer" to another court "until" that court has had an opportunity to exercise its jurisdiction over a habeas petitioner's unexhausted claims.

Courts considering habeas petitions containing both exhausted and unexhausted claims after the enactment of AEDPA have disagreed as to the appropriate disposition. The Seventh Circuit has recommended that district courts stay mixed petitions. *Freeman v. Page*, 208 F.3d 572, 577 (7th Cir. 2000). The Fifth Circuit has allowed

district courts to dismiss mixed petitions. *Graham v. Johnson*, 168 F.3d 762, 778 (5th Cir. 1999). The Ninth Circuit has recommended that district courts dismiss only the unexhausted claims of mixed petitions and stay the remaining claims. *Calderon v. United States District Court*, 134 F.3d 981, 986-88 (9th Cir. 1998). We have not yet explicitly considered the issue.

Like the Seventh and Ninth Circuits, we think that the enactment of AEDPA warrants some adjustment in the pre-AEDPA requirement of *Rose v. Lundy* that mixed petitions be dismissed in their entirety. What the Supreme Court wanted to achieve, and what AEDPA reenforces, *see* 28 U.S.C. § 2254(b)(1)(A), is the assurance that a district court will not grant relief on unexhausted claims. That requirement of *Lundy* can be met by dismissing only the unexhausted claims. As to the exhausted claims, we think a district court should exercise discretion either to stay further proceedings on the remaining portion of the petition or to dismiss the petition in its entirety. In many cases, a stay will be preferable, *see Duncan*, 2001 WL 6772270, at *10 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment) ("[T]here is no reason why a district court should not retain jurisdiction over a meritorious claim and stay further proceedings pending the complete exhaustion of state remedies."), and, as discussed below, will be the only appropriate course in cases like Zarvela's where an outright dismissal "could jeopardize the timeliness of a collateral attack." *Freeman*, 208 F.3d at 577. *See Duncan*, 2001 WL 6772270, at *10 (Stevens, J., with whom Souter, J., joins, concurring in part and in the judgment) ("Indeed, there is every reason to [stay proceedings pending exhaustion] . . . when the failure to retain jurisdiction would foreclose federal review of

a meritorious claim because of the lapse of AEDPA's 1-year limitations period."):

We recognize, however, that a stay, unless appropriately conditioned, could permit a habeas petitioner to take an undue amount of time to pursue state court remedies. We noted that problem in *Warren*, which concerned a habeas petitioner whose petition was dismissed without prejudice so that he could pursue new, unexhausted claims in the state courts. *Warren*, 219 F.3d at 113. After the dismissal, he failed to present his new claims to the state courts, and sought to return to the federal court to reactivate his original petition more than 20 months after its dismissal. He contended that the time between the dismissal and his request for reactivation should be tolled from the one-year limitations period. We rejected his claim, ruling that he had failed to exercise the " 'reasonable diligence' " required for equitable tolling. *Id.* (quoting *Smith*, 208 F.3d at 17). We also rejected his claim that his refiled petition related back to the initial filing date of his dismissed petition. *Id.* at 114. Sharing a concern expressed by the Fifth Circuit, we noted that if Warren's contention were upheld, a habeas petitioner whose petition was dismissed for lack of exhaustion " 'could then wait decades to exhaust his state court remedies and could also wait decades after exhausting his state remedies before returning to federal court to "continue" his federal remedy, without running afoul of the statute of limitations.' " *Id.* (quoting *Graham*, 160 [sic; 168] F.3d at 780).

However, the concern about excessive delays in seeking exhaustion and in returning to federal court after exhaustion can easily be dispelled by allowing a habeas petitioner no more than reasonable intervals of time to present his claims to the state courts and to return to

federal court after exhaustion. *Cf. Adams v. United States*, 155 F.3d 582, 584 n.2 (2d Cir. 1998) (petitioner improperly denied opportunity to file timely collateral attack afforded new opportunity "provided that he does so promptly"). Therefore, where a district court elects to dismiss only unexhausted claims and stay proceedings as to the balance of the petition, the court should condition the stay on the petitioner's initiation of exhaustion within a limited period, normally 30 days, and a return to the district court after exhaustion is completed, also within a limited period, normally 30 days. With the time to initiate exhaustion and to return to federal court thus limited, a stay of the exhausted claims will often be preferable to a dismissal of the entire petition because such a stay will reflect the continued viability of the initially filed exhausted claims. Moreover, a stay, explicitly conditioned on the petitioner's taking action within limited intervals, alerts the petitioner to the need for expeditious exhaustion.

Accordingly, when a district court, confronted with a mixed petition, elects to stay the petition, it should explicitly condition the stay on the prisoner's pursuing state court remedies within a brief interval, normally 30 days, after the stay is entered and returning to federal court within a similarly brief interval, normally 30 days after state court exhaustion is completed.[3] If either

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[3] An appropriately conditioned stay is not inconsistent with *Geraci v. Senkowski*, 211 F.3d 6 (2d Cir. 2000), in which a refiled habeas petition was untimely where the petitioner waited 283 days after his conviction became final to pursue an initial state collateral challenge, 78 days after that challenge was denied to pursue a second state collateral challenge, and seven days after that challenge was denied to return to federal court. That 368-day total rendered his petition untimely by three days. *Id.* at 8-9 (alternate holding). While the first collateral challenge was pending, an initial habeas petition had

condition of the stay is not met, the stay may later be vacated *nunc pro tunc* as of the date the stay was entered, and the petition may be dismissed (unless the time the petitioner has taken to initiate exhaustion in the state courts and to return to federal court after exhaustion has not consumed more than the portion of the one-year limitations period that remained when the habeas petition was initially filed). These two intervals will, in a sense, afford some petitioners (those with fewer than 60 days remaining on the limitations period) brief additional time, beyond the normal one-year period, to pursue state court remedies and return to federal court. We think such brief additional time is consistent with the purpose of AEDPA's limitation period, which was to make sure that a state prisoner does not take more than one year after his conviction becomes final to present his federal claim. State prisoners should have the full year allowed them by Congress to consider and prepare their federal habeas petitions, and, if it turns out that the presence of unexhausted claims and the requirements of federal law require a round trip to and from state court to accomplish exhaustion, brief intervals to meet such requirements should not be counted against that one-year period. Prompt action by the petitioner to initiate exhaustion and return to federal court after its completion serves as the functional equivalent of the "reasonable diligence" that has long been a prerequisite to equitable tolling of limitations periods. Moreover, once

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been filed and dismissed for lack of exhaustion. *Geraci v. Senkowski*, 23 F. Supp. 2d 246, 251 (E.D.N.Y. 1998). The brief intervals we authorize on this appeal as conditions of a stay would not have aided Geraci because he did not return to federal court within 30 days after his first state collateral challenge was denied. Instead, 78 days later, he filed a second state collateral challenge. *See Geraci*, 211 F.3d at 9.

a stay is entered and properly conditioned, the brief intervals for the trip to and from state court technically would not add to the limitations period; the timely filed petition remains timely, regardless of what steps the district court takes in the course of adjudicating it. Furthermore, a habeas petitioner, like any civil litigant, is entitled to amend his petition, *see* 28 U.S.C. § 2242, and an amendment will "relate back" to the date of his original petition if the added claim "arose out of the conduct, transaction, or occurrence set forth" originally. Fed. R. Civ. P. 15(c)(2). *See Fama v. Commissioner of Correctional Services*, 235 F.3d 804, 814-16 (2d Cir. 2000); *see also Anthony v. Cambra*, 236 F.3d 568, 576-78 (9th Cir. 2000) (permitting amended habeas claim to "relate back" to original petition where petition put defendant on notice of amended claim).

If a district court elects not to stay the exhausted claims and instead dismisses the entire petition, it should normally include in the dismissal order an appropriate explanation to a *pro se* petitioner of the available options and the consequences of not following required procedures. For example, the dismissal order might usefully advise the petitioner of his option to drop his unexhausted claims and resubmit a petition containing only his exhausted claims, or to exhaust his unexhausted claims in state court and then return to federal court. It would also be useful to alert the petitioner to the one-year limitations period of AEDPA and to the fact that a portion of that period has already elapsed. *See Adams*, 155 F.3d at 584 n.2 (recommending advising certain *pro se* habeas litigants as to AEDPA limitations period). In a context less fraught with obscure procedural perils than habeas corpus, we have ruled that *pro se* litigants against whom summary judgment is sought should

receive notice that they must submit opposing affidavits to preserve factual disputes for retrial and be warned of the consequence of failing to do so. *See Sawyer v. American Federation of Government Employees, AFL-CIO*, 180 F.3d 31, 34 (2d Cir. 1999).

Applying the foregoing reasoning to Zarvela's case, we conclude that his petition should have been stayed, with only the unexhausted claims dismissed. Although a district court would generally have discretion whether to stay the exhausted claims of a mixed petition or dismiss the entire petition, outright dismissal was not appropriate for Zarvela because, with so little time remaining on his statutory one-year limitations period, a complete dismissal "jeopardize[d] the timeliness of a collateral attack." *Freeman*, 208 F.3d at 577. We think he is entitled to have his petition treated as if it had been stayed, provided his entry to the state courts and his return occurred promptly, matters we now consider.

Zarvela went promptly from federal court to state court. On June 2, 1997, Judge Raggi granted his motion to withdraw his federal habeas petition, and the state court treated his state collateral attack as filed on June 11, 1997. Had his exhausted claims been stayed in the federal court, this prompt initiation of state exhaustion of his unexhausted claims would have been well within the brief interval that would have been an appropriate condition of such a stay.

Zarvela's return to federal court after his state collateral challenge was also prompt. Once the state court collateral challenge was concluded, Zarvela waited only 14 days to hand his habeas petition to prison authorities for transmission to the District Court for

refiling.[4] Judge Raggi counted eleven of these fourteen days against the AEDPA limitations period, subtracting three days for the State Court ruling to reach Zarvela by mail. In her view, this rendered his refiled petition untimely, because he had only two days of the AEDPA limitations period remaining when he originally filed in federal court. However, had a stay been entered, as we think should have occurred in this case, this prompt return to federal court (whether within eleven or fourteen days) would have occurred well within the second brief interval (for return to federal court after exhaustion) that would have been an appropriate condition of a stay.

Because Zarvela's initially filed petition was timely when filed and should have been stayed, subject to appropriate conditions, and because his prompt trip to and from the state courts satisfied the conditions that should have been included in a stay, the initial petition may be considered on its merits.[5] Judge Raggi's contrary decision is entirely understandable, inasmuch as she could not have anticipated our decision calling for a properly conditioned stay in circumstances like those confronting Zarvela. Moreover, she accorded him

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[4] Zarvela's refiled petition, sought to be renewed after his initially filed petition had been dismissed without prejudice to permit exhaustion, was properly not considered a "second or successive petition" within the meaning of 28 U.S.C. § 2244(b)(2). *See Slack v. Daniel*, 529 U.S. 473, 485-87 (2000); *Warren*, 219 F.3d at 113 n.1.

[5] The claims presented in that initial petition (and renewed in the refiled petition) are properly before the District Court because that initial petition should have been stayed. Whether the new claim presented in the refiled petition is entitled to be considered to "relate back" to the timely claims in the initial petition is a matter for consideration by the District Court.

the relief he sought (withdrawal of his petition). His predicament was created by his failure to alert the District Court that a properly conditioned stay would have been the preferable response to his filing of a mixed petition. Under the circumstances, especially as the implementation of AEDPA's limitation requirements is being developed, we do not think this *pro se* litigant should lose his opportunity to present his constitutional challenge to his conviction because he requested the wrong form of procedural relief.

Conclusion

We reverse the dismissal of Zarvela's refiled petition and remand for further proceedings.[6]

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[6] In view of our disposition, we need not consider (1) Zarvela's claims that circumstances during his prison confinement warrant equitable tolling, (2) Judge Raggi's decision to extend the one-year limitations period by three days because he was notified by mail of the state court's denial of his collateral challenge, or (3) the significance, if any, of the lack of a separate judgment reflecting Judge Raggi's ruling granting Zarvela's motion to withdraw his initially filed petition.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

97-CV-2393 (RR)

VICTOR ZARVELA,

Petitioner,

—against—

CHRISTOPHER ARTUZ, Superintendent,
Green Haven Correctional Facility,

Respondent.

APPEARANCES

VICTOR ZARVELA
Inmate No. 92-A-0942
Drawer B, Route 216
Stormville, New York 12582
Petitioner *Pro Se*

HONORABLE CHARLES J. HYNES
KINGS COUNTY DISTRICT ATTORNEY
210 Joralemon Street
Brooklyn, New York 11201
Attorney for Respondents
By: Morgan J. Dennehey
Assistant District Attorney

MEMORANDUM & ORDER

RAGGI, District Judge:

Victor Zarvela, who is presently incarcerated, serving a term of twenty-five years to life for Murder in the Second Degree, petitions this court for a writ of habeas corpus. *See* 28 U.S.C. § 2254. Zarvela originally filed his petition on April 22, 1997. Thereafter, he moved to withdraw his suit in order to present an unexhausted claim in state court. This court granted the request on June 2, 1997. On October 7, 1998, Zarvela refiled his federal petition. By that time, however, his claim was untimely. Accordingly, the petition is dismissed.

Factual Background

Petitioner Victor Zarvela was convicted in 1992 after a jury trial in New York State Supreme Court, Kings County, of Murder in the Second Degree, N.Y. Penal Law § 125.25[1] (McKinney 1999) and Criminal Possession of a Weapon in the Second Degree, N.Y. Penal Law § 265.03 (McKinney 1999). On January 17, 1995, the Supreme Court, Appellate Division, Second Department, affirmed petitioner's conviction. *See People v. Zarvela*, 211 A.D.2d 690, 622 N.Y.S.2d 465 (2d Dept 1995). On June 2, 1995, the Court of Appeals denied petitioner's request for leave to appeal. *See People v. Zarvela*, 86 N.Y.2d 743, 631 N.Y.S.2d 624 (1995) (Ciparick, J.). Petitioner did not file a petition for a writ of certiorari with the United States Supreme Court.

Meanwhile, on August 8, 1994, petitioner filed his first motion pursuant to N.Y. Criminal Procedure Law § 440.10 with the Supreme Court, Kings County, collaterally challenging his conviction. The Supreme Court denied that motion on March 15, 1995, and the Appellate Division denied leave to appeal on June 22, 1995.

In June 1997, after this Court granted Zarvela's request to withdraw his initial § 2254 petition, Zarvela filed a second § 440 motion. This was denied on July 31, 1998, and on September 23, 1998, the Appellate Division again denied leave to appeal. Approximately two weeks later, on October 7, 1998, petitioner refiled his federal petition for a writ of habeas corpus with this court.

Discussion

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-132, 110 Stat. 1214, which took effect on April 24, 1996, requires a prisoner challenging the constitutionality of his state conviction to file his federal petition for a writ of habeas corpus within one year of when his conviction becomes final. *See* 28 U.S.C. § 2244(d)(1)(A); *Ross v. Artuz*, 150 F.3d 97, 99 (2d Cir. 1998). For those petitioners whose convictions became final before the effective date of the AEDPA, the Second Circuit has approved a one-year grace period from April 24, 1996. *See Ross v. Artuz*, 150 F.3d at 103 (extending filing date for convictions that became final before the AEDPA to April 24, 1997).

Zarvela falls into the latter category since his conviction became final on August 31, 1995, ninety days after the New York Court of Appeals denied petitioner's request for leave to appeal. *See People v. Zarvela*, 86 N.Y.2d 743, 631 N.Y.S.2d 624; Sup. Ct. R. 13(1) (petition for writ of certiorari must be filed with Clerk of U.S. Supreme Court within 90 days of final judgment). When he initially filed his petition with this court on April 22, 1997, only two days remained before the grace period recognized in *Ross v. Artuz* expired. Thereafter, Zarvela was allowed to withdraw his petition to file a second § 440 motion in the state courts. While that motion was pending, the two days remaining on the

federal limitations period was tolled. *See* 28 U.S.C. § 2244(d)(2) ("time during which a properly filed application for state post-conviction or other collateral review with respect to the pertinent judgment . . . is pending shall not be counted toward any period of limitation under this section"). But when, on September 23, 2998 [sic], the Appellate Division denied petitioner's request for leave to appeal the Supreme Court's denial of 440 relief, the limitations period began to run again.[1] Because Zarvela was presumably served with the Appellate Division decision by mail, Federal Rule of Civil Procedure 6(e) granted him an additional three days in which to make a timely § 2254 filing. Thus, as of September 23, 1998, Zarvela had five days within which to refile his federal petition. It was not until October 7, 1998, however, fourteen days after the denial of his collateral review in state court, that petitioner renewed his application with this court.[2] Thus, his petition is nine days late.

Petitioner does not contest the fact that his petition is untimely. Instead he asks the Court to equitably toll the limitations period to excuse his lateness. He explains that his delay was due to the fact that he received the Appellate Division's notice while in "lock down" from June until November 1998. He further explains that he

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[1] The Appellate Division's decision was not reviewable by the New York Court of Appeals and, thus, there is no tolling period for time to file for leave to appeal. *See People v. Baxley*, 84 N.Y.2d 208, 212, 616 N.Y.S.2d 7, 10 (N.Y. 1994) (§ 440 motions on the grounds of newly discovered evidence are beyond the review of the Court of Appeals).

[2] Zarvela's petition was not docketed with the court until October 14, 1998. Because motions under § 2254 are deemed to have been filed on or about the date they are delivered to prison officials for filing with the court, *see Houston v. Lack*, 487 U.S. 266 (1988), this Court assumes that Zarvela's petition was so delivered on the date he signed the motion, *i.e.*, October 7, 1998.

lacks legal knowledge, does not read or write English, and required the assistance of a Spanish-speaking law clerk. Since he was in lock down, he could only correspond with the law clerk in writing, which delayed the refiling of his habeas petition.

Equitable tolling of the habeas time limitations is appropriate in "extraordinary circumstances." *Calderon v. United States*, 128 F.3d 1283 (9th Cir. 1997); *Armand v. Strack*, 1999 WL 167720 *3 (Feb. 19, 1999 E.D.N.Y.). Extraordinary circumstances are those that "effectively prohibit[ ] the petitioner from pursuing a habeas, such as the misplacement of files, or being denied access to materials necessary to file a habeas petition." *Raynor v. Dufrain*, 28 F. Supp. 896, 900 (S.D.N.Y. 1998). That is not this case.

Zarvela's time in lock down neither prevented him from receiving the Appellate Division decision nor prevented him from refiling his petition, as he was in lock down during the entire time in question. Indeed, he was in lock down on July 31, 1998 when the Supreme Court denied his second § 440 motion and when he filed a request for leave to appeal with the Appellate Division. By his own admission, and as circumstances have demonstrated, he was not denied access to his legal materials or prohibited from filing papers with any court. Thus, the court does not find that Zarvela's presence in lock down is an extraordinary circumstance which effectively made it "impossible to file his petition" on time. *Davis v. Johnson*, 158 F.3d 806, 810-11 (5th Cir. 1998) (equitable tolling appropriate in "rare and exceptional circumstances").

Moreover, the lack of access to a law clerk, illiteracy, lack of English fluency and ignorance of the law have all been considered and rejected by courts as insufficient to demonstrate that circumstances effectively prohibited petitioner from filing in a timely manner. *See Armand v.*

Strack, 1999 WL 167720 at *5 (and cases cited therein). Thus, the court denies Zarvela's request to toll the statute of limitations.

Conclusion

Zarvela filed his petition for habeas corpus with this court nine days after the expiration of the statute of limitations. Because he presents no exceptional circumstances that warrant the equitable tolling of the statute of limitations, his petition must be *dismissed*. A certificate of appealability is *DENIED*.

SO ORDERED.

Dated: Brooklyn, New York
December 3, 1999

/s/ *Reena Raggi*
REENA RAGGI
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE
STATE OF NEW YORK
APPELLATE DIVISION :
SECOND JUDICIAL DEPARTMENT

___ AD2d ___ Argued—December 19, 1994

GUY JAMES MANGANO, P.J.
VINCENT R. BALLETTA, JR.
CORNELIUS J. O'BRIEN
EDWARD J. HART, JJ.

92-01387

THE PEOPLE, ETC.,

respondent,

—v.—

VICTOR ZARVELA,

appellant.

(Ind. No. 5719/90)

Mitchell Dranow, New York, N.Y., for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Roseann B. MacKechnie, Anthea H. Bruffee, and Lisa A. Barkan of counsel), for respondent.

DECISION & ORDER

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Starkey, J.), rendered January 21, 1992, convicting him of murder in the second degree and criminal possession of a weapon in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant contends that the admission of evidence of his involvement in the drug trade constituted reversible error. This contention is unpreserved for appellate review (*see*, CPL 470.05[2]; *People v Medina*, 53 NY2d 951; *People v Scott*, 197 AD2d 646). In any event, the trial court properly admitted evidence of the defendant's involvement with drugs to show motive (*see*, *People v Alvino*, 71 NY2d 233; *People v Vaughn*, ___ AD2d ___ [2d Dept., Nov. 7, 1994]; *People v Jackman*, 188 AD2d 550; *People v Garcia*, 173 AD2d 399) and to complete the narrative of events (*see*, *People v Garcia*, *supra*: *People v Clark*, 167 AD2d 552; *People v Powell*, 157 AD2d 524). This evidence was properly admitted, on the facts of this case, even though the defendant was not charged with a crime involving a controlled substance (*see*, *People v Clark*, *supra*).

The defendant's remaining contentions are unpreserved for appellate review and, in any event, without merit.

MANGANO, P.J., BALLETTA, O'BRIEN and HART, JJ., concur.

ENTER:

Martin H. Brownstein
Clerk

January 17, 1995

PEOPLE v ZARVELA, VICTOR

SUPREME COURT STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM PART 15

BY: STARKEY, J.
DATED: MARCH 15, 1995
IND. NO. 5719/90

THE PEOPLE OF THE STATE OF NEW YORK

VS.

VICTOR ZARVELA,

Defendant.

APPEARANCES OF COUNSEL

FOR THE DEFENDANT:

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92-A-0942
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FOR THE PEOPLE:

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(A.D.A. Daniel A. Velez, of counsel)

VICTOR ZARVELA
IND. NO. 5719/90

Defendant was convicted of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree. He now moves, *pro se*, pursuant to Criminal Procedure Law § 440.10(1)(g) and (h) to vacate his judgment of conviction entered January 21st, 1992 after a jury trial. Defendant relies on what is claimed to be "new evidence" presented by two witnesses discovered after conviction. Defendant also argues that trial counsel was ineffective for failing to move for dismissal of the indictment because of the presence of an unauthorized person in the Grand Jury during presentment. See CPL § 210.35(5). Finally, defendant claims violations of his right to attend side-bar discussions during trial. See *People v. Antommarchi*, 80 N.Y.2d 247 (1992).

THE FACTS

At trial Police Officer Peter Palazzo testified that on February 26, 1990, at about 9:18 P.M. (TT 37-38)[1], he went to 360 Linden Street, Brooklyn (TT 39). Officer Palazzo stated that upon arrival, he observed a male lying on the sidewalk with a bullet wound near his eye (TT 42-44).

The male was one Tracy Hill, the deceased, who was removed by ambulance and died soon afterward (TT 45).

Detective William Ponzio then testified that on the night of February 26, 1990, (TT 73-74), he canvassed the buildings at 360, 364 and 366 Linden Street, to locate possible witnesses. According to the detective, the people interviewed during the canvas included Lysbeth Mora, Doris Lugo, Juan Gonzolez, and Frances Estrada. Each denied being an eyewitness (TT 79). (It should be

[1] "TT" refers to trial transcript.

noted, however, that each ultimately testified. Lysbeth Moran, Doris Lugo, and Frances Estrada testified as defense witnesses and Juan Gonzolez was called by the prosecution as the sole eye witness to the shooting).

Juan Gonzolez testified (TT 88-89) that on February 26, 1990, he was in front of 364 Linden Street with the deceased, Tracy ("Blackie") Hill. The witness further stated that he and the deceased sold illegal drugs which were obtained from various persons, including the defendant (TT 94). He also testified that during February, 1990, he and the deceased regularly cheated their customers by "shorting them" and then used, themselves, the drugs withheld from the customers (TT 101-102).

According to the witness, the defendant then drove up and told them to get off the block because the defendant intended to put someone else in charge of drug sales. The defendant, he testified, also stated that customers were being lost because of their cheating and that "one of us is going to get hurt" (TT 107).

The witness further stated that later the same day, at about 9:18 P.M., he was in front of 364 Linden Street (TT 110) and the deceased was nearby in front of 360 Linden Street (TT 112). According to the witness, the defendant then arrived in an automobile and (TT 114) demanded "Blackie's" drug inventory. (TT 115). The deceased first refused (TT 116), the witness stated, then complied (TT 117)—at which time the defendant shot and killed him where he stood. The witness testified that he then went to the third floor of 634 Linden Street where Lysbeth Mora called an ambulance (TT 121). The witness further stated that he had lied to the police about the shooting because he was afraid of the defendant, who had threatened him. He testified that, after that, defendant had praised him for lying and rewarded him with money and drugs (TT 123, 137).

Alba Cabrera then testified (TT 230) that on February 26, 1990 at 9:15 P.M. she went to the corner of Linden Street and Wyckoff Avenue to buy drugs for her own use (TT 231) from her sister, Maria, and saw "Blackie" there, also selling drugs (TT 232). The witness stated that she then went to the middle of Linden Street to smoke the crack with her cousin, Magaly, when she and her cousin heard a shot and ran towards the sound (TT 234). She further stated that they then saw the deceased on the ground and the defendant standing nearby (TT 235)—at which time the defendant said, "Nobody better say anything." The witness also testified that Juan Gonzolez was in the vicinity at the time (TT 248).

The first witness called by the defense was Lysbeth Mora (TT 262) who stated that on the day "Blackie" was shot, she was in her mother's apartment at 634 Linden Street, 3rd floor right. She also stated that she did not hear shots but that, at one point, Juan Gonzolez ran into the apartment, bleeding (TT 263).

Defendant, Victor Zarvela testified that before he learned of the shooting, he was at two nearby Chinese restaurants (TT 348). He stated that he and his girlfriend Doris Lugo spent about twenty minutes in the second restaurant and left between 9:25 and 9:30 p.m. (TT 354). He said that on the way home they saw the ambulance near a neighborhood bodega (TT 354). He stated that he did not shoot "Blackie" (TT 349) and that he did not witness the shooting.

Importantly, defendant claimed that he made his entire living by installing rugs and did not deal in drugs (TT 360)[2]. He also denied hiring anyone to manage a drug

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[2] Defendant's judgment of conviction was affirmed by the Appellate Division Second Judicial Department on January 17, 1995. On appeal the Appellate Court held that the trial court properly admitted evidence of defendant's involvement in the drug trade.

spot or employing either the deceased or Johnny Gonzolez to sell drugs (TT 362-363).

Janet Rosa then testified that around the time of the shooting she looked out her window and saw a white person—not the defendant—running from the scene (TT 413-415). She also stated that she had lied to Detective Ponzio by telling him that she had not been home at the time of the shooting.

Doris Lugo then testified that the defendant was her ex-boyfriend (TT 433) and that, on the night "Blackie" had been shot, she had gone with the defendant to a Chinese restaurant (434-435). She stated, however, that at the time of the shooting she had already arrived home and ran out into the street when the shooting occurred (TT 434-35).

Ms. Lugo conceded that, when interviewed by Detective Ponzio after the shooting, she did not mention that she had been with the defendant that evening in the restaurant (TT 439). She also stated, contrary to the defendant's testimony, that the defendant was, in fact, a drug trafficker (TT 450-451).

THE CLAIMED NEWLY DISCOVERED EVIDENCE

In support of the application based on "newly discovered evidence", defendant presents two written statements said to be affidavits. One is a statement of one Joseph Bivona, dated September 25th, 1993, and the other is signed by one Michael Cornell Patton dated October 23rd, 1993. Copies of each are annexed as exhibits one and two, respectively.

THE LAW

1. *The Claim That Counsel Was Ineffective.*

Defendant urges that there was an unauthorized person, one Laura Astarita, in the grand jury room during the presentation, that she was left alone in the room with jurors during deliberations, that the grand jury proceedings were therefore defective pursuant to CPL § 210.35(5) and that trial counsel was ineffective for failing to move for dismissal on those grounds.

A person claiming to have been deprived of effective assistance of counsel has the heavy burden of demonstrating that trial counsel provided less than meaningful representation, rather than a simple disagreement over strategy or tactics. *Peope v. Rivera*, 71 N.Y.2d 705, 708 (1988); *People v. Benn*, 68 N.Y.2d 941 (1986). It must be demonstrated that trial counsel failed to provide "meaningful assistance", viewing the evidence, the law and the circumstances of the case "in totality". See *People v. Baldi*, 54 N.Y.2d 137, 147 (1981). A demonstration of actual prejudice is also necessary. See *Strickland v. Washington*, 466 U.S. 668 (1984); *People v. Sullivan*, 153 A.D.2d 223, 227 (2d Dep't 1990).

Defendant fails to meet these requirements. Defendant's counsel successfully moved for inspection of the grand jury minutes and, on October 2, 1990, the court concluded that the grand jury minutes were sufficient. Further, the people's uncontradicted supplementary affirmation establishes that, at the time of the presentment in May, 1990, Laura Astarita was an Assistant District Attorney in Kings County and, therefore, was properly present in the grand jury pursuant to CPL § 190.25(3)(a). The claim that Ms. Astarita was present during grand jury deliberations has no evidentiary support whatsoever. In light of the above, it is clear that the grand jury pro-

ceedings were not defective and defendant has failed to establish his claim of ineffective assistance of counsel.

2. *Defendant's Claim That His Conviction Should Be Vacated Because He Was Denied His Right To Attend Side-bar Conferences.*

Defendant notes that there is no record that he was informed of his right to attend side-bar discussions, or that he intelligently or voluntarily waived those rights. See *People v. Antommarchi*, 80 N.Y.2d 247 (1992). The difficulty with this contention is that the defendant's trial took place in December, 1991, prior to October, 1992—when the *Antommarchi* case was decided. That fact is decisive, since the Court of Appeals has held that the *Antommarchi* case is applicable only prospectively. See *People v. Mitchell*, 80 N.Y.2d 519 (1992). In any event, a sufficient trial record exists in that respect to have permitted adequate review on direct appeal. The motion, therefore, is also fatally flawed pursuant to CPL § 440.10(2)(b).

3. *The Claim Based On "Newly Discovered Evidence".*

In the first instance, it should be noted that neither the statement of Mr. Bivona nor that of Mr. Patton introduces the text in the manner traditionally associated with affidavits ("_____, being duly sworn, deposes and says:") and, while the Bivona statement bears the legend "Sworn to me, this 25th day of Sept. 1993" over what appears to be a notary public's stamp and signature, it also carries at the top a different and conflicting date: September 11, 1993[3]. The Patton statement, while it bears what appears to be a notary public's stamp and

[3] See CPLR § 2309(b), which requires that an oath be administered in a form calculated to awaken the conscience and impress the mind of the person taking it in accordance with his religious or ethical beliefs.

signature, nowhere asserts that it was ever sworn to at all. As such, it is entitled to no weight. See CPL § 440.30(4)(b); *People v. Lawson*, 191 A.D.2d 514, 515 (2d Dep't 1993).

Problems as to form aside, it is well settled that evidence presented in a motion to vacate a judgment of conviction must meet six criteria to be newly discovered within the meaning of CPL § 440.10(1)(g). See *People v. Salemi*, 309 N.Y. 208, 216 (1955); *People v. Priori*, 164 N.Y. 459, 472 (1900). The criteria include the following:

1. the evidence must have been discovered since the trial, and
2. the evidence must be such as could have not been discovered before trial by the exercise of due diligence, and
3. the evidence must be material to the issue, and
4. the evidence must not be cumulative to the former issue, and
5. the evidence must not be merely impeaching or contradicting, and
6. the evidence must be as such as will probably change the result if a new trial is granted.

Further, a motion pursuant to CPL § 440.10 must contain sworn allegations of fact substantiating or tending to substantiate all of the essential facts necessary to support the motion. See *People v. Lawson, supra*; CPL § 440.30(4)(b). Conclusory claims will not suffice. See *People v. LaPella*, 185 A.D.2d 861, 862 (2d Dep't. 1992). Nor will claims that the testimony of a witness would significantly aid defendant's cause without setting forth the content of the evidence relied upon. See *People v. Ford*, 46 N.Y.2d 1021, 1023 (1979); *People v. Session*, 34 N.Y.2d 254, 256 (1974); CPL § 440.30 (1) and (4)(b).

In light of the above standards, the statement of Mr. Bivona is insufficient to require a hearing. In the first instance, the allegations of fact do not substantiate or tend to substantiate all of the essential facts necessary to support the motion. Nowhere, for example, does he state that he actually observed who shot the deceased or that the defendant was not the one who did so. Secondarily, the statement—at least by implication—merely contradicts the testimony which implicated defendant at trial. Finally, the evidence is not such as would probably change the result if a new trial were granted. In addition to the defects noted above, the statement is made by one with a criminal record, who was "on probation at the time," and is disjointed, confusing and implausible. While Mr. Bivona speaks first of a "white kid I know" who "walked to the crack spot" and "pulled out a gun" (after which Mr. Bivona says he *heard* a shot), he never states that the "white kid's" name was Richie Gardino or that he even knew his name. Then, without further explanation, he states that he saw "Richie Gardino" get into a car and leave the scene, after which—apparently for the first time—he claims to have noticed the crack dealer "laying on" the basement doors. Nor does the statement that he was on probation "at the time" explain a delay of almost four years before announcing his availability as a witness.

As to the unsworn statement of Mr. Patton, it should be noted that the motion would be insufficient to require a hearing even if the statement had been in affidavit form. His statement also merely contradicts the testimony which implicated the defendant at trial and—as one who resided or had relatives residing at 366 Linden Street at the time—he was presumedly discoverable as a witness by the exercise of due diligence before trial. Finally, his claims are also not such as would—alone or in combination with those of Mr. Bivona—probably

change the result if a new trial were granted. While his statement is more coherent than that of Mr. Bivona, it is inconsistent with it in important respects. It is surprising, for example (if he and Mr. Bivona saw the same episode), that Mr. Bivona—but not Mr. Patton or Mr. Gonzolez—saw "the white kid going up the stairs" just before the shooting, that Mr. Bivona did not see the deceased surrender his crack inventory to the gunmen as did Mr. Patton and Mr. Gonzolez and that Mr. Patton—but not Mr. Bivona—saw the deceased shot down as he was running away. Mr. Patton's claims are further burdened by the absence of an explanation for his failure to come forward for nearly four years and by the suggestion—inherent in his claim that he "yelled out the window" to ask the deceased "who was selling drugs" and that the deceased answered that he was—that Mr. Patton, himself, was part of the neighborhood drug scene. The statement is also weighted by implausibility, including the statement that such things are shouted from window to street, and vice versa, even in "drug prone" neighborhoods. Finally, neither statement gains strength from the substantial evidence received at trial of defendant's willingness to corrupt and threaten witnesses.

In light of the above, the defendant's motions are denied. This constitutes the decision and order of the court. The clerk is directed to send copies to the defendant and the District Attorney.

/s/ *James G. Starkey*
J.S.C.
JAMES G. STARKEY

SUPREME COURT STATE OF NEW YORK
COUNTY OF KINGS
CRIMINAL TERM PART 15

BY: HON. JAMES G. STARKEY
INDICTMENT NO. 5719/90
DATED: July 31, 1998

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

—against—

VICTOR ZARVELA,

Defendant.

APPEARANCES OF COUNSEL

For the Respondent:

Office of Charles J. Hynes
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By: Joseph Huttler, Esq.
Assistant District Attorney
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For the Defendant:

Victor Zarvela, *Pro Se*
No. 92 A 0942
Drawer B
Stormville, New York 12582

VICTOR ZARVELA
Ind. No. 5719-90

Defendant, *pro se*, moves pursuant to C.P.L. § 440.10 to vacate his judgment of conviction on grounds of a claim of newly discovered evidence. Additionally, defendant moves in a separate notice of motion for the transcripts of sentencing minutes relating to Juan Gonzalez a/k/a Johnny Gonzalez. Annexed to the request for sentencing minutes is a Freedom of Information request made pursuant to the Public Officers Law for the criminal record of Gonzalez.

Defendant was convicted after a jury trial of Murder in the Second Degree and Criminal Possession of a Weapon in the Second Degree, and the judgment of conviction was entered on January 21, 1992. On January 17, 1995, defendant's judgment of conviction was affirmed by the Appellate Division Second Department (*People* v. *Zarvela*, 211 A.D.2d 690 (2d Dep't 1995), and thereafter his appeal to the Court of Appeals was denied. *People* v. *Zarvela*, 86 N.Y.2d 743 (1995).

Additionally, in a prior motion pursuant to C.P.L. § 440.10, the defendant moved to vacate his judgment of conviction on the grounds of newly discovered evidence. Annexed to the instant motion papers are affidavits and statements from Joseph Bivona and Michael Cornell Patton which were submitted to this court as newly discovered evidence in the prior motion.

On March 15, 1995, this court by its decision and order denied defendant's previous C.P.L. § 440.10 motion without hearing. (See *People* v. *Zarvela*, NYLJ April 10, 1995, p.31). As to the claim of newly discovered evidence presented in the prior C.P.L. § 440.10 motion, the court held, among other things, that the statements of Mr. Bivona and Mr. Patton did not meet some of the requirements set forth in *People* v. *Salemi*,

309 N.Y. 208 (1995) and *People* v. *Priori*, 64 N.Y. 459 (1900), and were "weighted by implausibility."

In addition to resubmitting the statements of Mr. Patton[1] and Mr. Bivona, defendant for the first time submits the statement of Gregorio Brito, presently in prison for a drug related murder, and the statement of Olga Soto, a resident of 366 Linden Street, Brooklyn, at the time of the murder of the deceased.

In his affidavit Mr. Brito states, among other things, that he met the defendant at Green Haven Correctional Facility and that he saw the shooting of the deceased by someone he is sure was not defendant. Annexed to Mr. Brito's statement—without identification or explanation—is a portion of what appears to be a New York City Police Department homicide investigation report of Mr. Brito's statement to the police dated December 8, 1993. Mr. Brito's statement of December 8, 1993 contains a confession that he shot a different deceased in the same area at an unspecified time in a drug related dispute. The police report also contains the following sentence: "When I was at my house Victor called me and told me that the victim die."

Aside from the fact that Mr. Brito's testimony would be merely contradictory of evidence at trial, the close geographic locations of the shootings involving the defendant and Mr. Brito, as well as similar motives and circumstances, along with the reference to a call from "Victor" in the police report, suggest that defendant's relationship with Mr. Brito antedated their simultaneous incarceration. That conclusion, in turn, invites the inference that Mr. Brito's statement could have been discovered by the defendant prior to trial. See C.P.L.

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[1] Defendant submits herewith (for the first time) a second statement from Mr. Patton sworn to July 2, 1996, together with Mr. Patton's original unsworn statement dated October 23, 1993. The two statements are similar.

§ 440.10(1)(g). While he implies that he was unavailable because he became a fugitive in his own murder case, there is no mention whatever concerning the date of that murder or when he became a fugitive. Similarly, while Mr. Brito implies that he met defendant for the first time in prison, he never says so explicitly and, as noted above, other evidence invites the opposite conclusion and the conclusion that Mr. Brito's testimony is implausible and would—alone or in conjunction with that of Joseph Bivona, Michael Cornell Patton and Olga Soto—be unlikely to change the outcome in the event of a retrial.

The statements of Olga Soto and Mr. Patton, both of whom resided at 366 Linden Street at the time of the crime, also could have been discovered with the exercise of due diligence prior to trial by a canvass of that address. Ms. Soto's statement, in which she asserts that she heard Mr. Patton state that he had witnessed the murder of which defendant was convicted and describe the culprit's appearance in detail is also merely contradictory of evidence at trial and objectionable as hearsay. Thus, none of the statements submitted by the defendant qualify as newly discovered evidence.

Defendant's request for a subpoena for the criminal record of Juan Gonzalez a/k/a Johnny Gonzales is denied. The same application was made and denied by Justice Gloria Aronin on July 1, 1997. See copy of Justice Aronin's decision annexed.

Finally, Mr. Brito's conclusory claim that at the time of defendant's trial, Juan a/k/a Johnny Gonzalez was a police informant is purely speculative, unsupported by documentary evidence or other sworn allegations of fact and raises no issue requiring a hearing. See C.P.L. § 440.30(1). See also *People* v. *Rossney*, 186 A.D.2d 926 (3d Dep't 1992); *People* v. *La Pella*, 185 A.D.2d 861 (2d Dep't 1992).

The applications for a subpoena *duces tecum* and the sentencing transcripts of Juan a/k/a Johnny Gonzalez is denied as procedurally defective and not properly included in an application pursuant to C.P.L. Article 440 when hearing has not been ordered. Defendant may request sentencing transcripts of Juan a/k/a Johnny Gonzalez pursuant to the Public Officer's Law § 84 *et. seq.*[2] See *In re Gould* v. *New York City Police Department*, 89 N.Y.2d 267 (1996).

In view of the foregoing, the defendant's motions are denied. This constitutes the decision and order of the court. The clerk is directed to send copies to the defendant and the District Attorney.

/s/ *James G. Starkey*
James G. Starkey
J.S.C.

[2] In the event a transcript of Gonzalez's sentencing minutes is contained within the court's files, a similar request may be made to the Clerk of this Court. See Judiciary Law § 255; *Matter of Lewandowski* v. *OCA*, 173 Misc.2d 335, 340 (Supreme Court, Albany County 1997).